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ARTICLES

THE FUTURE OF FEDERALISM

*Robert F. Nagel**

I.

Is the United States about to undergo a significant transformation of the legal relationship between the national government and the states?

Some people think we might be. Timothy M. Phelps of *Newsday* discerns a "revolutionary states-rights movement within the court."¹ Linda Greenhouse of the *New York Times* says that "it is only a slight exaggeration to say that . . . the Court [is] a single vote shy of reinstalling the Articles of Confederation."² As if to congratulate herself on achieving this exaggeration, she goes on to quote Professor Tribe who said that "[i]t is hard to overstate the importance of how close they [are] to something radically different from the modern understanding of the Constitution."³ In addition, Jeffrey Rosen of *The New Republic* describes four Justices as "[h]aving rejected the constitutional legacy of the New Deal . . . [and as being] inclined to question the legacy of Reconstruction as well."⁴

As you might have gathered, the people I have just quoted are all concerned about what they see brewing. There are, of course, others who perceive the same radical possibilities, but they are breathless with anticipation rather than worry. For instance, writing in the *Wall Street Journal*, John G. Kester asserts that "[t]he court

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1. Timothy M. Phelps, *Judicial Revolution; Recent Cases Slant Towards States*, *Newsday*, May 29, 1995, at A13.

2. Linda Greenhouse, *Focus on Federal Power*, *N.Y. Times*, May 24, 1995, at A1.

3. *Id.*

4. Jeffrey Rosen, *Terminated*, *New Republic*, June 12, 1995, at 12, 12.

of 1995 mirrors the court of 1935, with the politics reversed.”⁵ Looking ahead to possible new appointments to the Court, he suggests that a Republican administration could do what Roosevelt did in 1937, that is, “seal a revolution that is rumbling already.”⁶ Roger Pilon of the Cato Institute told the *New York Times* that “[t]he Court is reaching the question at the heart of it all: Did we authorize all this government?”⁷

These kinds of claims and predictions are based on a number of factors. *United States v. Lopez* was startling in itself because it was the first decision in some five decades to define any limit to the meaning of the phrase “commerce among the states.”⁸ But *Lopez* came during the same term as two other important federalism cases. *U.S. Term Limits, Inc. v. Thornton*, while invalidating state authority over the number of terms that congressional representatives can serve, contained a strong dissent with potentially far-reaching implications for state power under the Tenth Amendment—a dissent endorsed by four members of the Court.⁹ Moreover, in *Missouri v. Jenkins*, the Court instructed lower federal judges that part of their duty in fashioning desegregation decrees is to return power over education to state and local authorities.¹⁰ These three cases seem especially significant in light of *New York v. United States*,¹¹ decided three years earlier. In *New York*, the Court held that the Tenth Amendment prevents Congress from requiring states to take title to low grade radioactive waste because such a requirement would “commandeer” sovereign states as agencies of the national government.¹² Although the ultimate implications of this decision are uncertain, it did resuscitate at least some of the doctrine of *National League of Cities v. Usery*¹³ that Justice Brennan had called a “catastrophic judicial body blow” to national power.¹⁴

5. John G. Kester, *The Bipolar Supreme Court*, WALL ST. J., May 31, 1995, at A17.

6. *Id.*

7. Greenhouse, *supra* note 2, at B8.

8. 115 S. Ct. 1624 (1995).

9. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

10. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2038-54 (1995).

11. 505 U.S. 144 (1992).

12. *Id.* at 145.

13. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

14. *Id.* at 880 (Brennan, J., dissenting); *see also* Robert F. Nagel, *Federalism's Slight Revival*, 1993 PUB. INTEREST L. REV. 25, 25-39 (discussing the potential of the *New York* decision to initiate a limited resurrection of federalism).

Perhaps more unnerving (or exhilarating, depending on your point of view) than this pattern of decisions is that they appear to be in tune with the prevailing political winds. States' rights seem at least momentarily ascendant. Political moderates have proposed a "Conference of the States" to pressure for a major redistribution of authority back to local governments.¹⁵ Congress is (as I write) considering a welfare reform bill that would "devolve" authority on welfare to state governments.¹⁶ A statute limiting "unfunded mandates" has been enacted.¹⁷ All this is taking place against the drumbeat of expressed dissatisfaction created by new books, incessant talk radio shows, and even the somber fact of militia organizations. Today, it is rare indeed to hear anyone refer with much confidence to the government in Washington D.C..

The sense that we may be on the verge of important alterations in the federal system, then, is entirely understandable. Even sophisticated observers, who are not inclined to overreact to every lurch in the case law or to overestimate the actual capacity of the Court to achieve its objectives, might well take the view that serious change is at hand. After all, the fact that we are all accustomed to living under a fairly centralized administrative state does not foreclose dramatic revisions to that structure. Periods of radical transformation do occur. When intellectual themes in judicial decisions are not only potentially far-reaching but persistent and when those themes reflect wider social movements, it is possible that the Supreme Court may be signaling—or even helping to induce—one of those transformations.

15. See COUNCIL OF STATE GOVERNMENTS, THE NATIONAL GOVERNORS' ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LEGISLATURES, *CONFERENCE OF THE STATES: AN ACTION PLAN TO RESTORE BALANCE IN THE FEDERAL SYSTEM* (Dec. 20, 1994) (unpublished, on file with author); see also David S. Broder, "New Federalism" Is Back, *DENVER POST*, Dec. 11, 1994, at 1H, 5H (discussing the endorsement by the Council of State Governments of a Conference of the States); Tony Snow, *States' Uprising Aims to Put Uncle Sam in His Place*, *USA TODAY*, Mar. 20, 1995, at 13A (describing the proposed "Conference of the States"); George F. Will, *Tenth Amendment Time*, *NEWSWEEK*, Jan. 9, 1995, at 68, 68 (stating that Utah's Republican Governor Mike Leavitt and Nebraska's Democratic Governor Ben Nelson have proposed a "Conference of the States" to give a voice to the states' dissatisfaction with the current division of power between the federal and state governments).

16. See Ronald Smothers, *Gingrich Predicts Agreement on Welfare Bill by Thanksgiving*, *N.Y. TIMES*, Sept. 18, 1995, at A12 (quoting Gingrich on his belief that President Clinton is eager to sign a welfare reform bill and therefore he is confident that a welfare reform bill will be agreed upon in the near future).

17. See Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995).

But I do not think so. I can begin to explain why not by focusing on what seems to me to be potentially the most expansive aspect of *Lopez*.

II.

The formal doctrine adopted by the *Lopez* majority "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."¹⁸ Like many judicial "tests," this one has the ring of relevance and realism. Anyone reassured by this formulation would be consternated to discover a page or two later in the opinion that the Court does not actually engage in the required analysis. I do not mean that the Justices engaged in the inquiry superficially or unsatisfactorily; I mean they did not make the inquiry at all.

This failure is not something that requires subtle analysis to discover. It is apparent on the face of the opinion. The Court first summarizes the Government's "essential contention."¹⁹ That contention was that the possession of firearms in school zones can be expected to result in violence and that such violence can be expected to have economic consequences because it is costly in itself and also reduces the willingness of economic actors to travel into dangerous areas.²⁰ The Court also summarizes the Government's contention that violence threatens the educational process and thus reduces productivity.²¹ Because the Court states these claims as if it is going to deny them, it is possible to miss the fact that it does not do so. Instead, the Justices "pause to consider the implications of the Government's arguments."²² Those implications are, according to the majority, that under the Commerce Clause the national government could regulate "all activities that might lead to violent crime . . . [or affect] the economic productivity of individual citizens."²³ Thus, the Court concluded that "if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate."²⁴

18. 115 S. Ct. at 1630.

19. *Id.* at 1632.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

My point in detailing this part of the *Lopez* opinion is not to quarrel with the Court's conclusion, which seems to me to be accurate. My point is the entirely obvious one that the Court's conclusion is not an application of its announced test. In fact, the *reason* why there is force to the Court's claim that the Government's contention would prove too much is because it is logically possible—even as a practical matter highly likely—that such everyday matters as the quality of family life (or public schooling) do affect productivity. If these activities did not have economic consequences, their regulation would be readily distinguishable from the circumstance depicted by the Government in *Lopez*. In short, the Court's analysis effectively concedes that regulation of guns near schools would have a substantial effect on commerce.

Thus, in my view, the *Lopez* decision is potentially far-reaching not because it authoritatively announces the "substantial effects" test, but because at a crucial point the Justices abandon that test. To appreciate the full implications of the Court's approach, consider how it would have affected the outcome of *Katzenbach v. McClung*, in which the Court upheld the public accommodations provisions of the Civil Rights Act of 1964.²⁵ Under the analysis actually utilized in *Lopez*, it would not have mattered in *Katzenbach* that racial integration of public accommodations might have had—in fact, did have, as it turned out—a very substantial effect on the economies of Southern states.²⁶ Even in the face of this strong connection to commerce, the *Lopez* logic would have required invalidation of the Civil Rights Act because it is difficult to conceive of *any* aspect of race relations, including private racist acts and beliefs, that does not have the potential to sour human interactions and depress economic activity.

I recognize that *Katzenbach* is formally different from *Lopez* in certain respects. The restaurant at issue in *Katzenbach* served

25. 379 U.S. 294, 304 (1964).

26. See generally JACK M. BLOOM, CLASS, RACE, AND THE CIVIL RIGHTS MOVEMENT (1987) (arguing that racial discrimination in the South was inextricably intertwined with the upper class's struggle to maintain its economic advantages); see also GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 6, 19 (2d ed. 1971) (demonstrating that racial discrimination had substantial detrimental economic effects, particularly on Southern Blacks); JOAN HOFFMAN, RACIAL DISCRIMINATION AND ECONOMIC DEVELOPMENT 4-18 (1975) (arguing that discrimination has retarded economic development in the Southern states).

food that had moved across state lines²⁷ while there is no such "jurisdictional tie" regarding the guns regulated in *Lopez*. But any conceivable object of regulation will necessarily involve *something* that has traveled in interstate commerce. Everyone knows that schools, police departments, and families all purchase goods that have been a part of commerce. Therefore, the much-heralded jurisdictional tie is itself subject to the logic of *Lopez*—that is, the asserted tie to commerce would potentially allow national regulation of any imaginable activity.

It is also possible to depict cases like *Katzenbach* as different from *Lopez* by saying that they involved commercial enterprises, like restaurants, rather than education. But the *Lopez* approach, fully applied, would devour the distinction between commercial and noncommercial activities in the same way that it would demolish the significance of the jurisdictional tie. Even if the word "commerce" is used to mean only the production and sale of goods, there is no end to the local activities, such as a child's lemonade stand, that potentially could be subject to national regulation. Moreover, the majority itself points out that "depending on the level of generality, any activity can be looked upon as commercial."²⁸ This is true, of course. Schools and families, for instance, can be viewed as producers of economic participants that eventually sell themselves in the market. Under the analysis employed in *Lopez*, the identification of this kind of conceptual slide means that the Court is not obliged to examine the scale of economic effects. This leads to the absurd conclusion that commercial activities themselves are beyond the commerce power even when the Court is unable to demonstrate that they do not have sizable economic consequences.

Certainly, it is possible to criticize the Court both for failing to apply its own announced test and for the expansive potential that arises from that failure. However, that is not my purpose. In fact, the point that I want to develop is that the Court's behavior is quite understandable and, indeed, is even built into the interpretive process. I hope to show that what we are witnessing is an aspect of normal, predictable doctrinal gyrations, not the beginning of a significant political transformation.

27. 379 U.S. at 296-97.

28. *Lopez*, 115 S. Ct. at 1633.

III.

The aspects of the *Lopez* decision that I have been focusing on are understandable and predictable as soon as we consider the problem faced by the Court. That problem is that our Constitution only authorizes certain enumerated powers for the national government, but also authorizes some enumerated powers that are broad enough to allow congressional control over any aspect of human affairs. This dilemma has various subparts or versions. The best-known is that Congress is delegated not only enumerated powers but also those extra powers necessary and proper for accomplishing its objectives. Another is that, while it is possible to insist on a superficial distinction between commercial and other kinds of activities, noncommercial behavior has substantial effects on the economy. Another is that there inevitably are both commercial and noncommercial effects and purposes involved in any wise policy. These dilemmas are known to virtually all educated observers, but their insuperability is usually not fully acknowledged because most of those observers are committed to judicial review.

If, as the practice of judicial review requires, constitutional meaning is to be determined as a part of the adjudicative process, it is necessary that the content of the Constitution be coherent enough to yield singular answers. Puzzles, contradictions, omissions, mistakes, parallel truths, and similar blemishes must be disregarded because the enterprise of interpretation is subordinate to the enterprise of authoritative dispute settlement. For obvious reasons, it simply will not do for a judge to say, "The Constitution is a mess on this point and cannot provide any single answer." The lawyer's task, therefore, is to help obliterate multiple meanings. Substantive dilemmas are the occasion for our work, not the objects of our curiosity. Lawyers are so accustomed to this great intellectual constraint imposed by judicial review that we hardly notice it.

Suppose that we were not a part of the adjudicative process and we were studying the Constitution just to try to understand it. We would have to admit that under our system, Congress may regulate any imaginable activity, but that it has only defined, limited powers. We could, perhaps, attribute this contradiction to the Framers' lack of economic sophistication, to changes in social circumstances, or to the nature of collective decision-making. If we were inclined to trust in central planning, we might be concerned

that the fundamental charter places substantive limits on national regulatory power, but if we were in favor of decentralization we might worry about the limitless power to regulate commerce. We probably would end with an accurate but banal insight into the extreme fallibility of human efforts to structure public decision-making. What we could not do, if we were only interpreting and not adjudicating, is talk as if either horn of the dilemma were absent or unimportant.

Now, litigators and judges do not have the luxury of bemused inspection or full understanding. What alternatives are available to them? A number of options can be seen in the case law that has been built up over the decades.

First of all, lawyers can pretend that one horn of the dilemma does not exist. The Court did this when it denied that labor unrest in the nation's coal fields was linked directly enough to commerce to justify national regulation of working conditions at the mines.²⁹ This position, which focused on the ends for which national power may be exercised, ignored the existence of the Necessary and Proper Clause and the undeniable, brute fact that instability in the mining industry had had an enormous impact on commerce. As the ultimate abandonment of the distinction between "direct" and "indirect" effects suggests, the strategy of denial is difficult to sustain for long. It is, if my assumptions are correct, fundamentally and demonstrably untrue to the meaning of the document. Moreover, when applied rigidly in the real world, this strategy is likely to have disastrous consequences because there can be practical reasons for either centralization or decentralization depending on the time and the setting.

A second tactic is more flexible and also more credible. Using conventional legal justifications, the Court often devalues one or the other of the competing propositions. Common as it is, the overall logic of this approach is still worth examining. Conventional legal explanations, whether based on old-fashioned metaphors or modern balancing, acknowledge both horns of the dilemma and then provide various reasons why in a particular case they are not of equivalent importance. You will recall, for example, that it used to be the position of the Court that Congress could not prohibit shipment of goods produced by child labor.³⁰ This case acknowl-

29. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 307-10 (1936).

30. See *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918), *overruled in part by* *United*

edged but devalued the proposition that the commerce power allowed regulation for moral purposes; it explained that national regulation was appropriate only when shipment of the good created the moral harm or "polluted" the channels of commerce.³¹ The same method can be couched in more modern and realistic terms. For instance, the "substantial effects" test announced in *Lopez* concedes that commercial regulations can have non-commercial consequences and that prohibiting guns near schools could have some effects on commerce.³² Under the test as announced, however, these points are devalued for the reason that the demonstrated effects on commerce are not large enough. The strategy of devaluation can, of course, also be used to uphold legislation. For example, the Court approved national regulation of agricultural production that admittedly might otherwise be defined as "local" (because the wheat was meant for home consumption) on the ground that the regulatory program in question was generally aimed at wheat destined for interstate shipment.³³ In that instance, the practical necessities of administering a national program were a reason for devaluing the proposition that there is some regulatory authority that is beyond the power of Congress.

These kinds of explanations are familiar to us all and therefore have a certain plausibility. But ultimately, each depends on the assumption that "federalism" can be said to require one outcome or another in a particular case. To the extent that the underlying dilemma is, as I have claimed, unresolvable, the truth is that either outcome would be equally constitutional and, at the same time, equally unconstitutional. Hence, legalistic devaluation of either of the two relevant constitutional propositions will always be intellectually unsatisfactory if examined carefully. This dilemma, I think, is one reason the "substantial effects" test was only announced—and not applied—in *Lopez*. Although most people are not accustomed to thinking about the connection between conditions in public schools and robust commercial activity, there surely is such a connection and in the future that connection might be-

States v. Darby, 312 U.S. 100 (1941).

31. *Id.* at 271-72.

32. See *Lopez*, 115 S. Ct. at 1632 (depicting the Government's "cost-of-crime" argument as leading to the conclusion that all activities resulting in violent crime could be regulated under the Commerce Clause "regardless of how tenuously they relate to interstate commerce").

33. See *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

come as intuitive to the general public as the idea that working conditions in the mines affect interstate commerce. Moreover, even if the connection between public schooling and commerce were limited, nothing in the commerce clause dictates that Congress may regulate only those activities that have large effects on commerce.

The weaknesses in the strategy of denial and the strategy of legalistic devaluation create natural pressures toward what I will call "successive validation," which is the method actually used in *Lopez*. Under this approach, one horn of the dilemma is subordinated in the case at hand but the equivalency of the competing constitutional proposition is reasserted by a stated commitment to enforce that proposition in some future case. In its pure form, this strategy would take the form of randomized outcomes and thus, is not compatible with traditional legal norms. Nevertheless, muted versions of this tactic can be seen at work in the cases. As the *Lopez* opinion reminds us, each of the post-1937 cases approving congressional regulatory authority contained admonitions about the limited scope of the commerce power and indications that the Court might someday intervene if necessary to enforce those limits.³⁴ These admonitions were, in my view, mostly incompatible with the logic of the opinions in which they appeared, but they did serve to reassert the overall equivalency of the proposition subordinated in those cases. Of course, *Lopez* also contains its own commitments emphasizing the continuing validity of the principle that it subordinated, namely, that under the commerce authority Congress can regulate all aspects of life. The Court strongly suggests, for instance, that Congress could regulate guns at schools if it would only make some factual findings or link its regulation to the movement of something across state lines.³⁵

By promising future enforcement, these kinds of commitments reduce the pressure to devalue either of the competing propositions. Moreover, from a systemic perspective, the strategy of successive validation allows some realization over time of both propositions. The great difficulty, however, is that the method is inconsistent with the legalistic ideals of consistency and authoritativeness. As I explained earlier, the *Lopez* opinion employs logic that is incompatible with finding virtually any of the statutes approved since 1937 to be a valid exercise of the commerce power. *Lopez* is writ-

34. 115 S. Ct. at 1628-30.

35. *Id.* at 1631-32.

ten this way because it is an effort to enforce a constitutional principle that is irreconcilably at odds with the principle that was validated in the post-1937 cases. That is, precisely because under the method of successive validation the cases as a whole are true to the complexity of the Constitution, no one decision can be reconciled with all the others and each is partially (but deeply) unjustified.

The embarrassments created by these techniques force consideration of more extreme measures. One option would be for the Court to withdraw from enforcing both horns of the dilemma. Indeed, until *Lopez*, many academic observers thought that the definition of "commerce among the states" was effectively a matter for congressional judgment.³⁶ Judicial abdication, especially if explicit, would have its intellectual advantages. It would be consistent with the admission, as accurate as it is foreign to the legal mind, that either outcome of any particular case would be equally constitutional. Nevertheless, abdication is difficult to sustain over time because it conflicts with strong preferences in favor of judicial review.³⁷

The difficulties with all these strategies suggest a final option. Weary of all efforts to enforce or to withdraw from enforcing the principle of enumerated powers, the Court can claim to uphold that principle while substituting for it some other, more tractable value, such as democratic accountability.³⁸ The strategy of substitution has, obviously, considerable potential for intellectual embarrassment, but it is nevertheless sustainable to the extent that the courts' critics prefer whatever value the judiciary is enforcing over the values represented by federalism.³⁹

36. See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980) (discussing the "Federalism Proposal," namely, that questions concerning the division of power between the federal government and the states should be left to the political branches); William Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1722 (1985) (stating that it has been the province of Congress to determine the degree to which enumerated powers displace state action).

37. See, Van Alstyne, *supra* note 36, at 1731 (arguing that by allowing judicial review to give way to the claims of the constitutive process, the court is committing a monumental error).

38. See *New York v. United States*, 505 U.S. 144, 168-69 (1992) (discussing the problem of accountability in order to justify its conclusion that a state's legislative process cannot be commandeered).

39. Federalism, of course, is what creates complicated lines of accountability. If states were fully subordinate to the national government, it would be clear where responsibility lay. Moreover, within the complex layers of state and local governments, it is not uncommon for lines of accountability to be confusing. For one interesting example, see FRANK-

There is nothing inevitable about any of the five adjudicatory strategies that I have outlined. In varying degrees and combinations, the Court can and has used all of them in attempting to domesticate the unresolvable dilemma presented by the principle of enumerated powers. The method of legalistic devaluation is no doubt the one most congenial to our profession, but the Court's history is littered with one failed and discarded doctrine after another. This strongly suggests that the intellectual deficiencies connected with this strategy are, as my assumptions about the contradictory nature of the relevant constitutional propositions would predict, unavoidable and profound. Of the remaining three approaches that involve judicial enforcement of some constitutional value, the strategy of successive validation has been used, I think, most frequently, and is truest to our actual, confused Constitution.

Given the intellectual and practical advantages of this method and given its wide use, *Lopez* is not at all surprising. In many cases since 1937, the Court has acknowledged both horns of an unresolvable dilemma and has repeatedly committed itself to the validation (in some future case) of the principle of limited national power that it was subordinating in the cases it was deciding.⁴⁰ Although it would have been possible, of course, for the Court to have simply continued this pattern, the full intellectual and practical advantages of the strategy of successive validation require at least some variation in outcome. In short, that the Court in *Lopez* should have eventually redeemed its pile of pledges seems a natural part of the most attractive interpretive strategy available. Although the opinion in which the redemption occurs is starkly inconsistent with many other cases, it is not necessarily a signal of radical change, for the inconsistency is a necessary part of the strategy and flows ultimately from the content of the Constitution itself.

I recognize that what I have said will not reassure those who are agitated in one direction or another by the prospect of the Court leading us into a transformation of our moderately central-

LIN F. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 211-12 (1991), which offers the example of prison sentences that are determined at the local level but paid for at the state level. Nevertheless, an influential scholar argues that political accountability is an important value of federalism. D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 639-65 (1985).

40. See *supra* text accompanying note 34.

ized governmental structure. I admit that, as an abstract matter, it would be consistent with the method of successive validation for the Court now to decide a series of cases limiting national regulatory power while committing itself to enforce (in some future case) the competing principle that Congress is effectively authorized to regulate any aspect of life.⁴¹ My reasons for thinking this highly unlikely require me to try to put the strategy of successive validation into a wider context.

IV.

Once we dispense with the notion that relevant constitutional propositions require any particular outcome in Commerce Clause cases, there are two assumptions under which *Lopez* might be seen as the beginning of a radical change of direction rather than as a quasi-random event. The first is that the beliefs and preferences of a majority of the members of the Court favor significant decentralization. The second is that external pressures in favor of such decentralization are now compelling enough to influence a significant number of the Court's decisions.

It seems doubtful to me that a majority of the Justices favor significant decentralization. Yes, it is true that a majority are Republican appointees and that augmenting state power is often associated with conservative politics. It is also true that at one time or another almost all the Justices have written warmly about the importance to our system of vigorous state governments. However, general inclinations and beliefs count only insofar as they are focused and strong enough to influence case outcomes. By this measure, I think the Court's record as a whole casts significant doubt on whether decentralization is highly valued by most members of the Court.

Since 1937, in no case except *Lopez* has the Court found a federal statute to exceed the scope of the commerce power. In fact, the Court has often enforced the Commerce Clause, but only to invalidate *state* laws deemed to be protectionist or insufficiently justified. In two cases, the Tenth Amendment was used to constrain

41. However, the Court has already passed up an opportunity to begin such a process. See *United States v. Robertson*, 115 S. Ct. 1732 (1995) (finding an Alaskan gold mining enterprise to be engaged in interstate commerce and, therefore, subject to federal regulation under RICO, on the grounds that the enterprise purchased some equipment, sought workers, and sold 15% of the mining output outside of the state).

Congress. One of these was overruled,⁴² and the other⁴³ has, at least on its own terms, only narrow significance.⁴⁴

Against whatever importance might be attached to *Lopez* and *New York* must be assembled the cases where extensions of national authority have been approved. In addition to the famous decisions that began in 1937, in just the past two decades there have been at least twelve cases validating national laws under the Commerce Clause.⁴⁵ There have also been, of course, many cases approving national statutes passed pursuant to other provisions, including the taxing and spending power and section five of the Fourteenth Amendment.⁴⁶

It might be objected that the Justices' putative preference for decentralization actually shows up in a different set of cases altogether, those in which constitutional rights are defined narrowly to make room for expanded state authority. Whether or not the federal sky is falling in this area—as so many legal academics are prone to assert—at most, these cases show a preference for decentralization as opposed to federal judicial power to protect individual rights. Although it might be suggestive, this preference does not necessarily imply anything about judicial priorities when national regulatory power is the competing consideration. A Justice's skepticism about the value of individual rights might be based in part on a belief that such rights unduly constrain the government's capacity to promote the general good. Belief in the importance of collective

42. *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

43. *New York v. United States*, 505 U.S. at 144.

44. *Id.* at 201 (White, J., concurring in part and dissenting in part) ("[T]he Court [is signalling that it] does not intend to cut a wide swath through our recent Tenth Amendment precedents.").

45. See *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993); *Dennis v. Higgins*, 498 U.S. 439 (1991); *South Carolina v. Baker*, 485 U.S. 505 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409 (1986); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226 (1983); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678 (1982), overruled in part by *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985); *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264 (1981); *Fry v. United States*, 421 U.S. 542 (1975).

46. In the past fifteen years, there have been four cases approving tax and spend statutes. See *New York v. United States*, 505 U.S. 144 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Harris v. McRae*, 448 U.S. 297 (1980).

action is not incompatible with a belief in a centralized administrative state.

Individual rights cases do usually tell us something about the Justices' preferences when the right trumps a state's policy, since standard constitutional doctrines involve some degree of judicial assessment of asserted state interests. Hence, the vindication of a right typically means that the judgments of state and local officials are being deprecated. At least in some cases the Court, including its conservative members, has shown a continuing willingness to do just this. *Texas v. Johnson*,⁴⁷ an opinion in which Justice Scalia joined, invalidated flag desecration statutes that had been enacted in some forty-eight states. This past term in *McIntyre v. Ohio Elections Commission*, seven Justices, including O'Connor, Kennedy and Souter, voted to strike down bans on anonymous campaign literature that had been thought to be a good idea in forty-nine states.⁴⁸ In *City of Richmond v. J. A. Croson Co.*⁴⁹ and *R. A. V. v. City of St. Paul*,⁵⁰ conservative Justices have displayed considerable readiness to second-guess government programs that attempt to compensate for or prevent racial injustices.

Recent cases pointing towards the termination of school governance by injunction can be cited as evidence of a movement towards states' rights, but nothing in them creates any challenge in principle to the plenary authority of federal courts to "disestablish" state and local decision-making institutions if necessary to vindicate national interests.⁵¹ Moreover, under these cases the precondition for termination of judicial supervision remains a finding that school officials are acting in "good faith" in all respects. Thus, skepticism about the motivations of local decision makers remains a touchstone in the school desegregation cases, and outward signs of sub-

47. 491 U.S. 397 (1989).

48. 115 S. Ct. 1511, 1520 (1995).

49. 488 U.S. 469 (1989).

50. 505 U.S. 377 (1992).

51. See *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (concluding that the restoration of power to state and local authorities is made subject to the condition that the schools are operating in compliance with the Constitution); *Freeman v. Pitts*, 503 U.S. 467 (1992) (allowing district courts to retain jurisdiction over various aspects of desegregation); *Board of Educ. of Oklahoma City Pub. Schs. v. Dowell*, 498 U.S. 237 (1991) (holding that the test applied by the court of appeals for dissolving a desegregation decree was more stringent than necessary). The word "disestablish" was first approved in *Missouri v. Jenkins*, 495 U.S. 33, 55 (1990). The later three cases are discussed in Nagel, *supra* note 14, at 33-36.

ordination to the authority of federal judges is still a significant part of the measure of equality in education.

Justice Thomas's dissent in the *U.S. Term Limits, Inc. v. Thornton*⁵² case is also cited as evidence of a strong preference for states' rights.⁵³ Those who are horrified (or delighted) to see that this dissent drew four votes seem less impressed with the corresponding fact that the majority opinion invalidating state authority over congressional term limits drew five votes. The majority position not only represents the established law of the land, but is profoundly nationalistic. By insisting that, at least in the setting of the case, reserved powers are limited to those that existed at the time of the framing of the Constitution,⁵⁴ this opinion comes close to requiring that states, like Congress, be specifically authorized to act. The majority also pushes for the idea that the nation as a whole has an interest in whom is elected from each state to be members of Congress.⁵⁵ It is possible to say that these strongly nationalistic themes need not be expanded to their full potential, but that reply could also be given for the states' rights positions taken by the four dissenters.

I recognize that there are many majority opinions containing rhetoric on the importance of judicial deference to state decision makers and that, in a sizable number of cases, claims of individual rights based on the national Constitution are defeated. My point is only that the record as a whole is mixed enough to cast doubt on the idea that devotion to decentralized decision-making is now an overriding value for most members of the Court. This is hardly surprising. One would expect officials of the national government, including judges, to be suspicious and jealous of competing centers of power in the states. One would expect jurists to be especially put off by decentralization because the unruly, unplanned world created by real decentralization is an affront to the decorous, rationalistic, perfectionist impulses that are so much a part of the culture of American legalism.⁵⁶

Even if I am right that the instincts and beliefs of most of the Justices are unlikely to result in any important changes in the

52. 115 S. Ct. 1842, 1875 (1995).

53. See, e.g., Greenhouse, *supra* note 2, at B8 (quoting Roger Pilon who asserts that Justice Thomas was "speaking for the future" in his dissent).

54. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1854.

55. *Id.* at 1855-56.

56. Nagel, *supra* note 14, at 38-39.

scope of national regulatory power, their preferences could be overborne by external political pressures nevertheless. It does seem to be true that sooner or later the Supreme Court goes along with the dominant trends of the time. On this possibility, like everyone else, I can only conjecture. My prediction is that current signs of dissatisfaction with the national government represent an epiphenomenon. In fact, many of the forces that at present appear to favor decentralization have attributes that could work out to encourage further centralization, and the deeper political and cultural pressures are, I think, consistent with this outcome.

A significant segment of the public is, as I said at the outset, disaffected from the government in Washington, D.C.. But many of these people are bitter and cynical about all government. To the extent this is so, they may oppose responsible proposals, such as the Conference of the States, that might help to make decentralization respectable to mainstream voters.⁵⁷ Even when angry groups support enhanced state authority, they may do so by supporting policies that continue the long association of "states' rights" with moral positions, like unrestricted gun ownership, that are not morally attractive to many Americans. At the extreme, anti-government zealots might undertake—and to some extent already have undertaken—acts or threats of violence that are very likely to enhance specific powers of the central government and generally to discredit the states' rights movement.

Against the forces that can be expected to congregate around the states' rights banner will be arrayed a cultural elite that is well entrenched in the universities, press, bureaucracies, and leadership of many interest groups. These people tend to be highly educated, respected, and adept at influencing public opinion; many of them are cut off from or even hostile to local communities and local politics. Since their dominant ideology involves the ambitious use of government for social reform, in general their power is maximized by minimizing the number of places where control needs to be exercised. They have been and will continue to be an effective force for centralization.

The struggle over decentralization must necessarily take place against a formidable backdrop of existing centralization. This means that, if predictions about radical decentralization are to be

57. The proposal was derailed in Colorado and elsewhere by just such groups. See Lynn Gorham, *Adkins Yanks Resolution on States' Parley Off Table*, THE CAPITOL REP., May 8, 1995, at 2, 2.

realized, Congress must cede power back to the states. It can be expected that some part of this devolution will be more apparent than real, as appears to be the case already with the unfunded mandates bill.⁵⁸ When real power is returned, it would only be natural for Congress to be inclined to select those issues that are most intractable, like welfare. This could mean that eventually state governments will suffer the political consequences of being responsible for highly visible, failed policies, while the national government—relieved of its disasters and clinging to its successes—could soon regain its stature as the effective level of governance.

The sorts of considerations and possibilities that I have been mentioning would not be especially important if the general political culture of the United States were strongly supportive of decentralization. While we do have deeply held habits and beliefs about political practices at the state and local level, in this century many aspects of our culture have favored centralization. Some of these, such as the psychic effects of the national government's association with the war power and with a vast capacity to tax and spend, are built in. Other causes of our national political culture are not inevitable but seem close to it. These include ease of mobility, nationwide channels of communication, and an optimistic, pragmatic spirit that does not easily abide the variations and imperfections that are inevitable consequences of decentralization.

Still, perhaps, something about the culture has changed or is changing in a way that will promote significant decentralization. For what it is worth, my own observation is that the main change seems to be an increasing sense of personal isolation and insecurity. If this is true, it could conceivably lead to a resurgence of local associations and local government. However, it could also lead to immature longings for reassurance of a sort that have sometimes inclined Americans to see their president as an intimate father-figure, their Congress as a bottomless guarantor of material welfare, and their Supreme Court as a church-like arbiter of moral truths. In short, if the culture is deteriorating, as many now be-

58. The unfunded mandate bill exempts some of the most important areas, such as civil rights (including protections for the disabled) and social security, from its coverage. Moreover, in the areas that are not exempted, Congress is still free to impose unfunded mandates by a majority vote. The effect of the law is only to require that unfunded mandates be identified and debated. Louis Fisher, *The "Contract with America": What It Really Means*, N.Y. REV. BOOKS, June 22, 1995, at 20, 20 (1995).

lieve, pressures toward nationalization may well soon be on the increase.

Against this backdrop of complex, imponderable political and cultural forces, the *Lopez* decision—and indeed, the Justices themselves—recede into relative insignificance. Those who perceive in that decision much to fear or much to hope for are, I think, not only seeing *Lopez* and the Court's overall record inaccurately, but they are looking for the future in the wrong place.

